

BEFORE THE
Federal Communications Commission
 WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Cellular Service and Other Commercial Mobile)
 Radio Services in the Gulf of Mexico)

WT Docket No. 97-112

Amendment of Part 22 of the Commission's)
 Rules to Provide for Filing and Processing of)
 Applications for Unserved Areas in the Cellular)
 Service and to Modify Other Cellular Rules)

CC Docket No. 90-6

**COMMENTS OF
 PRIMECO PERSONAL COMMUNICATIONS, L.P.**

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To: The Commission

**COMMENTS OF
PRIMECO PERSONAL COMMUNICATIONS, L.P.**

PrimeCo Personal Communications, L.P. ("PrimeCo" or the "Company"),¹ hereby files comments in response to the Commission's *Second Further Notice of Proposed Rule Making* in the above-captioned proceeding.² PrimeCo's existing PCS MTA service areas encompass the entire U.S. land area surrounding the Gulf of Mexico ("Gulf"), and the Company

¹ PrimeCo is a limited partnership comprised of PCSCO Partnership (owned by NYNEX PCS, Inc. and Bell Atlantic Personal Communications, Inc.) and PCS Nucleus, L.P. (owned by AirTouch PCS Holding, Inc. and U S WEST PCS Holdings, Inc.). PrimeCo is the broadband PCS licensee or is the sole general partner/majority owner in the licensee in the following MTAs: Chicago, Milwaukee, Richmond-Norfolk, Dallas-Fort Worth (Licensee: Dallas MTA, L.P.), San Antonio (Licensee: San Antonio MTA, L.P.), Houston (Licensee: Houston MTA, L.P.), New Orleans-Baton Rouge, Jacksonville, Tampa-St. Petersburg-Orlando, Miami, and Honolulu. For ease of reference, we refer to all of these licensees as "PrimeCo" or the "Company" in this pleading.

² *Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico, Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, Second Further Notice of Proposed Rulemaking*, WT Docket No. 97-112, CC Docket No. 90-6, FCC 97-110 (released April 16, 1997) ("*Second Further Notice*").

has expended monies and planned and deployed its PCS network with the expectation and understanding that it was authorized to provide PCS service to offshore areas in the Gulf.

For the reasons stated herein, PrimeCo believes that incumbent MTA and BTA PCS service area licensees have existing rights to provide service to customers in the Gulf. The Commission should confirm these existing service rights.

SUMMARY

The Commission has requested comment on “whether sufficient demand exists to justify an extension of broadband and narrowband PCS services into the Gulf of Mexico.”³ The Commission further states that it “[has] not extended [its] geographic area licensing rules in services such as PCS services to Gulf operations” and that “no provision has been made for the licensing of broadband or narrowband PCS in the Gulf.”⁴ As discussed below, however, PrimeCo disputes this statement for the reason that the Commission has *already* acted to authorize broadband PCS services into offshore areas of the Gulf through its allocation of the MTA/BTA PCS service areas. In addition, Bureau precedent and actions, and the Commission’s frequency allocation, technical and microwave relocation rules (as well as actions taken by microwave incumbents and PCS licensees to relocate Gulf-based links) also support PrimeCo’s view that incumbent PCS licensees have service rights in the Gulf’s offshore areas.

The public interest and the Commission’s objectives in this proceeding would be served by expressly recognizing Gulf service rights for incumbent MTA and BTA PCS licens-

³ *Second Further Notice* ¶ 60.

⁴ *Id.* ¶¶ 58, 60.

ees.⁵ PrimeCo has paid enormous sums for its MTA licenses surrounding the Gulf and in service deployment, and the Company has the right to serve customers and to locate facilities in the Gulf's offshore areas. The Commission's power and antenna height limits for PCS enable incumbent PCS licensees to provide reliable service to Gulf areas. The Company has planned and deployed its PCS network based on this service right and there is no basis for the proposed license modification.

Moreover, and in all events, the Commission must ensure that the existing service rights of current MTA and BTA PCS licensees are not undermined or otherwise compromised in this proceeding. Additional Gulf-based PCS licensees would create an unnecessary "Zone of Chaos" which will undermine the provision of reliable service to PCS customers — on land and in the Gulf.

PrimeCo therefore urges the Commission to confirm that PCS licensees abutting the Gulf ("incumbent PCS licensees") are the entities authorized to provide PCS service to Gulf offshore areas.⁶

⁵ See *id.* ¶ 2. The Commission's "principal goals in this proceeding are: (1) to establish a comprehensive regulatory scheme that will reduce conflict between water-based and land-based carriers, (2) to provide regulatory flexibility to Gulf carriers because of the transitory nature of water-based sites, and (3) to award licenses to serve well-traveled coastal areas to those carriers that value the spectrum most highly and will maximize its use to provide the best quality of service to the public." *Id.* As discussed herein, these objectives are all met by expressly recognizing the right of incumbent PCS licensees to provide Gulf service.

⁶ Attached to these Comments are declarations supporting the engineering/technical statements contained herein supplied by 1) William David Walker, Director of RF Engineering and Network Engineering for PrimeCo for the Houston MTA; and 2) Andrew Clegg, Senior Engineer, Spectrum Sharing Group, Wireless Communications Department, Comsearch (*see* Attachments A and B).

DISCUSSION

I. THE COMMISSION HAS ALREADY EXTENDED BROADBAND PCS SERVICES INTO THE GULF OF MEXICO AND AUTHORIZED INCUMBENT PCS LICENSEES TO SERVE THE GULF THROUGH ITS MTA/BTA ALLOCATION SCHEME

The Commission should expressly confirm that incumbent PCS licensees in MTAs and BTAs abutting the Gulf are authorized to serve the Gulf's offshore areas. As demonstrated below, MTA/BTA boundaries already extend PCS service areas into the Gulf. Furthermore, the Commission's frequency allocation, technical and microwave relocation rules all support PrimeCo's Gulf service claim, and the Wireless Telecommunications Bureau itself has stated that PCS licensees along the Gulf are authorized to serve Gulf offshore areas. Also, incumbent PCS licensees have expended monies and planned/deployed systems to provide Gulf service in reliance on the Commission's actions and service allocation.

A. The Commission's PCS Rules and Licensing Decisions Authorize PCS Licensees Bordering the Gulf to Serve Offshore Areas

The Commission's implicit assumption in the *Second Further Notice* that broadband PCS providers in the MTAs and BTAs abutting the Gulf are *not* authorized to serve offshore areas directly contravenes its own PCS service area boundary rules.⁷ The service and licensing rules for broadband PCS provide that "Broadband PCS service areas are [MTAs and BTAs]" and, in turn, BTAs and MTAs "are based on the Rand McNally 1992 Commercial Atlas

⁷ PrimeCo notes that in the *Second Further Notice*, the Commission addressed PCS licensees' existing Gulf service rights in cursory fashion. *See id.* at ¶¶ 59-60. Further, no new rules are proposed. To the extent that the Commission did not intend to disrupt existing MTA and BTA service area boundaries and existing Gulf service rights, PrimeCo requests Commission clarification.

& Marketing Guide, 123rd Edition at pages 38-39.”⁸ The underlying MTA/BTA boundaries are based on county lines which, in turn, are governed by state law. As demonstrated below, based on the Rand McNally designations, the MTA/BTA boundaries used to define broadband PCS service areas extend PCS service areas into the Gulf.⁹

A review of state statutory and constitutional provisions demonstrates that state law places county lines — and, therefore, incumbent PCS licensees’ existing MTA boundaries — varying distances into the Gulf. Thus, in the PrimeCo service areas, with respect to the Houston and San Antonio MTAs, county lines are based on the Three Marine League Line established by the Supreme Court’s decision in *Texas v. Louisiana*, 410 U.S. 702 (1973) — a distance of nine nautical miles from the low-tide coastline.¹⁰ Similarly, Louisiana’s Gulfward Parish boundaries in the New Orleans-Baton Rouge MTA extend a distance of three marine leagues from the Louisiana coast,¹¹ as do Gulfward boundaries of Florida’s Gulf coast counties

⁸ 47 C.F.R. § 24.202.

⁹ That cellular MSAs and RSAs do not include water areas is inapposite. *See PetroCom, Memorandum Opinion and Order*, 3 FCC Rcd. 399 (Commission adopted Census Bureau MSA/RSA definition “without modification” for cellular). The Commission expressly rejected MSA and RSA licensing for PCS, in part because BTAs and MTAs better represent patterns of commerce, and BTAs in particular because they “represent[] likely PCS markets in which local communications will take place.” *PCS Second Report and Order* at 7732-7733. In PCS licensing, the Commission adopted, without modification, Rand McNally’s policy of utilizing county lines in determining MTA/BTA boundaries. As discussed herein, those MTA/BTA PCS boundaries include Gulf water areas.

¹⁰ Tx. Nat. Res. §§ 11.012(a), 11.013(a) (1996); *see also In re Petroleum Communications, Inc.*, 1 FCC Rcd. 511, 513, n.9 (Mobile Serv. Div. 1988) (describing the term “coast-line”).

¹¹ La. Rev. Stat. §§ 49.1, 49.6 (1997).

in the Jacksonville, Tampa Bay and Miami MTAs.¹² Mississippi and Alabama, in contrast, are entitled to a seaward boundary three geographic miles from their coastlines.¹³ Under state law, however, county jurisdictions include islands within six leagues of the Gulf shore.¹⁴ Furthermore, the three mile line extends *from the southern coasts of those states' barrier islands*; accordingly, PrimeCo's service area also includes the eighty by ten mile area of the Mississippi Sound.¹⁵ Therefore, and based on the Commission's *existing* MTA allocations, PrimeCo's MTA areas extend into the Gulf a distance of up to three marine leagues — or approximately nine nautical miles.

PrimeCo expended nearly *\$500 million* at auction to acquire its PCS licenses for the MTA areas adjoining the Gulf,¹⁶ and the Company has expended well over an *additional \$500 million* for system deployment activities in these MTA areas. Based on existing political MTA boundaries, and its license authorizations, PrimeCo has an absolute right to provide service to Gulf offshore areas and to construct land and water-based base stations transmitting into the

¹² Fla. Const., Art. II § 1(a).

¹³ *United States v. Louisiana*, 470 U.S. 93, 95 (1984) (*Alabama and Mississippi Boundary Case*) (citing *United States v. Louisiana*, 363 U.S. 1, 79-82 (1960)).

¹⁴ *See* Ala. Const. § 37; Ala. Code § 41-2-1; Miss. Code Ann. §§ 3-3-5, 19-1-47, 19-1-49. Mobile County in Alabama thus includes Dauphin Island, which is understood to be the southern boundary of the state. *See Bosarge v. State*, 121 So. 427 (Ala. 1928). Similarly, Harrison County in Mississippi includes Ship Island and Cat Island, and Jackson County includes Horn Island and Petit Bois Island.

¹⁵ *See Alabama and Mississippi Boundary Case*, 470 U.S. at 94.

¹⁶ PrimeCo submitted \$493,954,361 for the MTA service areas adjoining the Gulf. License amounts for each MTA area follow: Tampa-St. Petersburg-Orlando — \$ 99,327,723; Miami-Ft. Lauderdale — \$ 126,020,126; Houston — \$ 82,680,425; San Antonio — \$ 51,950,059; New Orleans-Baton Rouge — \$ 89,475,484; and Jacksonville — \$ 44,500,544.

Gulf. The Commission conveyed to PrimeCo and other PCS licensees legally protected contract-based interests. In return for the payment of its winning bids, PrimeCo was granted rights to use the PCS spectrum in a manner consistent with the terms of the license. Thus, any effort by the Commission to establish separate Gulf PCS licensees by modifying PrimeCo's licenses represents both an unlawful license modification and arguably constitutes an unconstitutional taking.¹⁷

In addition, the Commission's PCS frequency allocation rules designate the 1850-1890, 1930-1970, 2130-2150, and 2180-2200 MHz bands on a *nationwide basis*, and make *no special provision for frequency use in the Gulf*.¹⁸ Since the PCS allocation scheme was intended to accommodate nationwide service with no PCS service "gaps,"¹⁹ PCS licensees fairly expected

¹⁷ Section 316 of the Communications Act requires that the Commission conduct formal hearing procedures prior to license modification, and places both the burden of introducing evidence and the burden of proof *on the Commission* to demonstrate that modification is in the public interest. 47 U.S.C. § 316. In addition, PrimeCo's license payments and systems expenditures vested certain contract-based interests and investment-backed expectations which the Commission cannot upset without compensation. *See United States v. Winstar Corp.*, 116 S.Ct. 2432 (1996) (holding government contractually liable where government afforded regulated entities particular regulatory treatment in exchange for valuable consideration); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) (regulation eliminating the entire value of a property interest is *per se* taking unless the original grant incorporated the limitation at issue); *see also Conoco Inc. v. United States*, 35 Fed. Cl. 309, 334 (1996) (material breach of Outer Continental Shelf Lease occurs where government unilaterally changes the fundamental terms of the lease); *Sun Oil Corp. v. United States*, 572 F.2d 786, 816-17 (Ct. Cl. 1978) (breach of contract regarding oil exploration on Outer Continental Shelf).

¹⁸ 47 C.F.R. § 2.106. It is generally the Commission's practice not to tie a frequency allocation to a specific geographic region. *In re Applications of Petroleum Communications, Inc. et al., Memorandum Opinion and Order on Reconsideration*, FCC 84-481, 56 Rad. Reg. (P&F) 1651, ¶¶ 5, 9 (rel. Oct. 18, 1984).

¹⁹ In fact, the Commission rejected licensing a *single* nationwide PCS license area in part because such a service area might instead effectively be accomplished by acquiring several licenses at auction or through nationwide roaming. *See PCS Second Report and* (continued...)

and understood that the Commission intended that the Gulf area be served by incumbent PCS licensees bordering the Gulf.²⁰ Indeed, had the Commission intended to exclude the Gulf from its frequency allocation, it would have done so explicitly.²¹

Further, based on existing PCS power and antenna height limits,²² MTA/BTA incumbent PCS licensees are fully authorized and capable of providing reliable service to Gulf customers. In addition, the Commission expressly addressed how it would treat PCS licensees' service area boundaries in the *PCS Second Report and Order*.²³ There, the Commission limited adjacent market signal excursions *only* where adjacent market (MTA and BTA) licensees were involved.²⁴ The field strength limit was intended to "limit[] the signal excursion over that boundary *into another licensee's market*."²⁵ Plainly, however, this limit only applies where there is a MTA or BTA licensee in an adjacent market at issue; in the case of the Gulf, there is neither

-
- ¹⁹ (...continued)
Order at 7732, 7734. Again, the Commission designated PCS spectrum for all areas of the United States through its PCS allocation scheme.
- ²⁰ In adopting its PCS auction rules, the Commission stated that "[a] total of 2074 broadband PCS licenses will . . . be issued." *Fifth Report and Order*, 9 FCC Rcd. 5532, 5534 (1994). No separate Gulf license areas were established.
- ²¹ *See, e.g.*, 47 C.F.R. § 2.106 footnote NG121 (1983) (limiting maritime mobile use of the 216-220 MHz band to the Mississippi River and Gulf Intracoastal Waterway). Notably, the Commission's eventual allocation of the 216-220 MHz band to include the Gulf of Mexico, 56 Rad. Reg. (P&F) 1613 (1984), was incorporated into the Commission's subsequent decision to allocate the band on a "nationwide" basis. *See Amendment of Parts 2 and 80 of the Commission's Rules Applicable to Automated Maritime Telecommunications Systems*, 6 FCC Rcd. 437 (1991).
- ²² 47 C.F.R. §§ 24.53, 24.232.
- ²³ 8 FCC Rcd. at 7773-75; 47 C.F.R. § 24.236.
- ²⁴ 8 FCC Rcd. at 7774 n.130 (emphasis added).
- ²⁵ *Id.* (emphasis added).

an adjacent licensee nor an adjacent MTA or BTA market allocated. Thus, the incumbent PCS licensees have service rights into Gulf areas, and there is no limit to the permissible signal excursion into the Gulf.²⁶

Moreover, the Commission's stated *policy* reasons for establishing MTA/BTA license areas for PCS service provision also *support* allowing incumbent PCS licensees to serve the Gulf — and importantly did not put incumbent PCS licensees on notice that Gulf offshore areas were off-limits to them. The Commission opted for MTA/BTA service areas in part because they are “based on the natural flow of commerce” and:

large PCS service areas [] may . . . allow licensees to tailor their systems *to the natural geographic dimensions of PCS markets* . . . and will facilitate the coordination and negotiation processes associated with the microwave relocation activities that will be necessary in many cases.²⁷

Economic activities in the Gulf, such as oil drilling and exploration and particularly boating are closely related to economic activities in the adjoining land- and water-based areas encompassed within the Gulf coast's MTAs and BTAs, and communications between boats or oil rigs and the shore clearly constitute the “natural flow of commerce” contemplated by the Commission in its PCS allocations. Indeed, the Commission appears to have recognized the importance of this concept in the *Second Further Notice*, noting that a proposed cellular service

²⁶ Since signal strength limits apply only on the border of another licensee's MTA service area, PrimeCo has properly designed and built many sites which cover both offshore and terrestrial areas in the MTAs surrounding the Gulf.

²⁷ *Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order*, 8 FCC Rcd. 7700, 7732 (1993), *aff'd in relevant part on recon., Memorandum Opinion and Order*, 9 FCC Rcd. 4957 (1994) (emphasis added). BTAs in particular were determined to “represent[] likely PCS markets in which *local communications* will take place.” *PCS Second Report and Order* at 7733 (emphasis added).

boundary encompassing the majority of coastal boat traffic in offshore areas along the coast would enable boaters “wish[ing] to remain in constant contact with people *on the shore* (e.g. for safety or other reasons), [to] plan their itineraries in such a way that they stay within the single license area.”²⁸ Communications by industrial users in the Gulf also are closely intertwined with land-based systems.²⁹ Thus, interpreting the Commission’s rules to confirm the authority given incumbent PCS licensees to serve Gulf offshore regions is entirely consistent with commercial activities in these areas and the Commission’s policy underlying the creation of MTA/BTA service areas.³⁰

B. The Wireless Telecommunications Bureau Has Confirmed that PCS Licensees Abutting the Gulf Are Licensed to Serve the Gulf

The Wireless Telecommunications Bureau (“Bureau”) has also recognized that incumbent PCS licensees are authorized to serve the Gulf. In *Mobil Oil Telcom*, a decision involving the primary versus secondary status of incumbent microwave licensees subject to relocation by PCS licensees, the Bureau stated:

²⁸ See *Second Further Notice* ¶ 30.

²⁹ Indeed, some incumbent 2 GHz microwave systems in the Gulf region have both land-based and water-based facilities. See *Mobil Oil Telcom* at 4115 (“remote safety shut-down units at each drilling rig are connected by means of the same microwave frequency to a master unit at the Mobile Bay gas plant”). Also, related to the recently-granted Shell Offshore Services Company (“SOSC”) applications for 6 GHz microwave common carrier licenses in the Gulf is the termination of its 2 GHz links. See *Shell Offshore Services Company*, 4 Comm. Reg. (P&F) 847, ¶¶ 27, 29 (Int’l Bur./WTB 1996) (citing the “pending obsolescence of the 2 GHz Part 94 systems currently in operation” in the Gulf as public interest factor warranting grant of licenses). In fact, PrimeCo paid monies and has relocated some of Shell’s offshore links. See *infra* n.35 and accompanying text.

³⁰ Moreover, as discussed herein, allowing incumbent PCS licensees to serve Gulf areas provides other public interest benefits, including reducing roaming charges for PCS subscribers in the area and avoiding customer confusion and service disruption. See discussion *infra* at Section II.

Unlike cellular mobile service, there is no [separate] PCS licensee for the water areas of the Gulf of Mexico. *Entities eligible to serve the Gulf of Mexico are the licensees of BTAs bordering the Gulf.*³¹

In granting Mobil Oil Telecom's applications on a primary basis, the Commission noted that "there is little chance for a PCS licensee to offer service in the Gulf of Mexico without placing transmitters on the drilling rigs owned by companies who are likely . . . to be incumbent 2 GHz licensees" and in this case "there [was] no increase in cost to a potential PCS licensee who may wish to relocate Mobil's 2 GHz links."³² Thus, the *Mobil Oil Telecom* decision indicates that the Commission was well-aware that incumbent PCS licensees have service rights in the Gulf.

The Bureau's statements regarding PCS service rights in the Gulf in the *Mobil Oil Telecom* case provided additional substantive support for broadband PCS licensees and "delineat[ed] the permissible activities of licensees."³³ In light of the deference that licensees give to an agency's interpretation of its own rules, the Commission's apparent departure in the instant proceeding from the position stated in *Mobil Oil Telecom* is alarming.³⁴ As discussed

³¹ *Applications of Mobil Oil Telecom, Ltd.*, 11 FCC Rcd. 4115, 4116 n.10 (Wireless Telecom. Bur. 1996) (emphasis added).

³² *Mobil Oil Telecom* at 4116. In Mobil Oil Telecom's Petition for Reconsideration, counsel noted that the then-Deputy Chief of the Wireless Telecommunications Bureau (Mr. Ralph Haller) in conversations confirmed that "*the Commission's policy is to assign primary status to 2 GHz licenses where the authorization will not impose any additional monetary burden on PCS auction winners.*" *Mobil Oil Telecom*, Stations WNTG 997 and WNTZ 385, Petition for Reconsideration, dated July 19, 1995, at 2 (emphasis added).

³³ *See Citizens Awareness Network v. Nuclear Regulatory Comm'n*, 59 F.3d 284 (1st Cir. 1995).

³⁴ *See Stinson v. United States*, 508 U.S. 36, 45 (1993); *Western States Petroleum Ass'n v. EPA*, 87 F.3d 280, 284 (9th Cir. 1996); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir.) (agency's interpretation of its own regulations is given controlling weight unless plainly erroneous or inconsistent with the regulation); *General Electric Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (agency's reading of regulations given deference even (continued...))

herein, this proposed change has negative ramifications for incumbent PCS licensees that the Commission must consider if it is to make a reasoned decision in this proceeding.

C. The Microwave Relocation Rules and PCS Relocation Activities Support PrimeCo's Service Claim

The Commission's rules governing the relocation of incumbent 2 GHz licensees to accommodate PCS operations apply to microwave incumbents generally, with no special provision — or separate treatment — for microwave incumbents in the Gulf. To date, at least seventeen microwave paths in the Gulf of Mexico have been replaced or deleted from microwave incumbents' licenses due to microwave relocation activity related to PCS operations.³⁵ Further, in all likelihood, these figures *understate* the microwave relocation-related activity in the Gulf. Paths that are the subject of relocation agreements may not yet be the subject of license modification applications. Furthermore, where relocation is accomplished through the addition of a path outside the 2 GHz band, the microwave incumbent may have ceased operations in the 2 GHz band without formally deleting its 2 GHz facilities.

³⁴

(...continued)

when petitioner advances more plausible interpretation than agency). PrimeCo notes that this is not an instance in which a licensee unreasonably relies on the *ex parte* guidance of a lower level official, but instead involves a reported decision of the Bureau delegated the authority to administer the Commission's PCS licensing rules. *See Western States Petroleum*, 87 F.3d at 285; *Puerto Rican Cement Co., Inc. v. EPA*, 889 F.2d 292, 289-99 (1st Cir. 1989); 47 C.F.R. § 0.131; *see also Motor Vehicle Manufacturers Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983).

³⁵

"Replaced" paths are currently licensed microwave paths for which an application has been filed to modify the path. "Deleted" paths have been deleted from incumbents' licenses via applications to modify the path. PrimeCo's analysis of the status of relocation efforts in the Gulf is based on a database inquiry performed by Comsearch.

Thus, the Commission's microwave relocation rules and policies and the actions of microwave incumbents and PCS licensees are also consistent with the view that incumbent PCS licensees were given Gulf service rights.³⁶

D. The Commission Must Protect Incumbent PCS Licensees' Reliance Interests and Authorized Operations

Nothing in the Commission's prior PCS actions indicated that incumbent MTA and BTA PCS licensees were precluded from serving offshore areas. Instead, these PCS licensees justifiably believed that they were entitled to serve the Gulf's offshore areas and have expended efforts (and monies) to provide Gulf service. Nothing "made it apparent that the Commission meant otherwise."³⁷ For its part, PrimeCo paid hundreds of millions of dollars for

³⁶ PrimeCo also is concerned that incumbent PCS licensees may be undercompensated for past microwave relocation efforts if separate Gulf-based licenses are established. Under the cost-sharing formula, the amount of compensation decreases as time elapses between the date the PCS relocater obtains reimbursement rights and the date the Clearinghouse notifies a later entrant of its reimbursement obligation, and PCS licensees incorporated this depreciation factor into their microwave relocation negotiations. *See Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, First Report and Order and Further Notice of Proposed Rule Making*, 2 Comm. Reg. (P&F) 1315, 1351-53 (1996) (describing depreciation factor). The Commission obviously has jeopardized continued short term PCS deployment in Gulf offshore areas by initiating this proceeding, thus adding to the depreciation factor. Further, premium payments are non-reimbursable, in part to impose a higher burden on initial PCS licensees who receive the benefit of being "first to market." *See id.* at 1354-55. However, as incumbent PCS licensees may no longer be first to market in the Gulf, any newly-allocated water-based PCS licensees would reap a windfall, based on the relocation efforts of the existing PCS licensees.

³⁷ *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1358 (D.C. Cir. 1993) (citing *Kansas Cities v. FERC*, 723 F.2d 82, 86 (D.C. Cir. 1983)). PrimeCo notes that, in contrast to PCS licensing where separate Gulf licensing is being considered nearly four years after service areas were established, the Commission's consideration of Gulf cellular licensing commenced just one year after the cellular licensing rules were established and during the same period that initial cellular licensing decisions commenced. *See Advanced Mobile Phone Service, Inc.*, 91 FCC2d 512 (1982) (order commencing cellular licensing released November 1, 1982) and *Public Notice*, Report No. CL-5, *Notice of Opportunity* (continued...)

licenses to provide PCS to the Gulf coast MTAs which, as discussed above, extend into the Gulf's offshore areas.³⁸ In addition, PrimeCo has expended significant additional monies in deployment and network planning activities to enable it to serve Gulf offshore areas.

At a minimum, the Commission must consider how the impact of its proposal would burden incumbent licensees' service rights and legitimate reliance interests.³⁹ PrimeCo bid for licenses and commenced deployment along the Gulf with the expectation that it would have no neighboring water-based PCS licensees, and with the knowledge that its service area boundaries extended into the Gulf. Thus, PrimeCo and other PCS bidders valued MTA and BTA licenses around the Gulf under the assumption that they would not encounter interference from water-based PCS licensees and could engineer and design their systems without adjacent PCS licensees in the Gulf. In turn, numerous PCS sites along the Gulf coast have been designed and/or constructed under the assumption that no interference from separate Gulf-based PCS licensees could or would occur. These existing and planned sites out of necessity transmit into the Gulf. Moreover, in areas such as Florida, Texas, Louisiana and Alabama, where population and transportation corridors press up to the water's edge, sites must be placed less than one mile

³⁷ (...continued)
to *Comment* (released Nov. 10, 1982) (requesting comment on PetroCom proposal for developmental cellular radio system in Gulf).

³⁸ Moreover, assuming *arguendo* that some ambiguity was present, absent a rational explanation for the policy change, incumbent licensees' reasonable interpretation that the Commission's rules authorized them to serve the Gulf must prevail over the Commission's after-the-fact determination that no such authorization exists. See *Citizens Awareness Network*, 59 F.3d at 291-292.

³⁹ See *Williams National Gas Co. v. FERC*, 3 F.3d 1544, 1553-55 (D.C. Cir. 1993) (discussing need to consider reliance interests to protect the settled expectations of those who had relied on preexisting rule in cases where agency rules represent shift from clear prior policy).

from the beach and *must* face Gulfward to provide reliable service within the land-based areas of the MTA. Again, PrimeCo's PCS signals, out of necessity, transmit to Gulf offshore areas.

Under the Commission's broadband PCS antenna height and power limits, PCS licensees are given considerable flexibility and have the technical capacity to render reliable PCS service within the Gulf. PrimeCo estimates that transmitters on its MTA sites can provide reliable PCS service significant distances into the Gulf. PrimeCo is authorized to provide such service and has acted in reliance on the fact that no competing water-based PCS licensees are present. Simply put, there is no basis for undermining or curtailing this existing service right.

II. A SEPARATE GULF OF MEXICO PCS LICENSE ALLOCATION SCHEME WILL JEOPARDIZE MTA/BTA LICENSEES' SERVICE RIGHTS AND IMPACT INCUMBENTS' LAND-BASED CUSTOMERS

For nearly *fourteen years*, the Commission has grappled with how to minimize interference disputes between land- and water-based cellular licensees.⁴⁰ As the Commission has routinely acknowledged, propagation characteristics over water and Gulf-based carriers' siting difficulties pose unique interference and frequency coordination problems for both water-based licensees and their neighboring land-based counterparts.⁴¹ In spite of cellular licensing's long history of Gulf service area problems — and in direct contravention of the Commission's stated policy of avoiding conflicts between land- and water-based licensees — the Commission has

⁴⁰ See *Second Further Notice* ¶¶ 37-40; *PetroCom*, 54 Rad. Reg. 2d (P&F) 1020, 1025-27 (FCC 1983).

⁴¹ *Id.*; *PetroCom, Memorandum Opinion and Order*, 1985 FCC LEXIS 2798, ¶¶ 20-23 (Com. Car. Bur. 1985); *PetroCom, Order on Reconsideration*, 1 FCC Rcd. 511, 513 (1986); *PetroCom, Order on Reconsideration*, 2 FCC Rcd. 3695 (1987); *Second Further Notice* ¶ 37.

proposed the possible establishment of new PCS service boundary lines and additional PCS licensees.

Should the Commission establish a separate Gulf service area (or areas), it risks creating a “Zone of Chaos” to the detriment of itself, PCS providers and, above all, PCS subscribers and the public. To illustrate, there are already numerous incumbent PCS licenses authorized to serve Gulf offshore areas. If the Commission followed its cellular service area proposal for PCS, there could be the possibility of 12 additional PCS licensees in the Gulf — 6 each in the “Coastal Zone” and “Gulf Exclusive Zone.” Such additional allocations would inevitably (and unnecessarily) compromise service to the public and create new disputes over interference, frequency coordination, facilities siting, microwave relocation, coverage boundary lines and other issues. For PCS, the Commission has the opportunity to not only “reduce” but *preclude* “conflict between water-based and land-based carriers” by formally acknowledging the right of incumbent PCS carriers to serve Gulf offshore areas. It should expressly do so.

A. Separate Gulf Licensing will Unnecessarily Result in Interference Problems and Disputes for Incumbent PCS Licensees

From an engineering standpoint, the characteristics of radiowave propagation over water will result in a greater number of conflicts between land- and water-based Gulf carriers, as compared to the number of conflicts between land-based systems.⁴² PrimeCo is

⁴² See *Second Further Notice* ¶ 2. Within a fifty-mile radius of a high site, the low-atmospheric phenomenon would cause the ground wave path to propagate in a non-straight-line fashion. The phenomenon is usually more pronounced over seawater because the atmospheric situation over the ocean can be varied based on the different altitudes. The wave path can bend either upward or downward. Under this circumstance, the signal may be very strong at one time in one spot but weak at another. See William C. Y. Lee, *MOBILE CELLULAR COMMUNICATIONS - ANALOG AND DIGITAL SYSTEMS* at 129-30 (1995).

particularly concerned about the potential for co-block interference if the Commission adopts a separate PCS Gulf service area, with newly-allocated water-based PCS licensees.

Further, these problems are acute for CDMA technology. PrimeCo's inability to isolate the CDMA signal against the background interference created by a prospective separate Gulf licensee would impose severe limitations on its ability to serve land-based customers along the Gulf. PrimeCo cannot simply position its base stations such that interference protection is created by "front to back" antenna isolation. Base stations on land, out of technical necessity, must look out towards the Gulf as well as inland, and directly into potential oncoming interference from water-based stations.⁴³ In addition, attempts to somehow minimize these significant technical problems will be enormously costly and will burden incumbent PCS licensees and the public with unreliable service and inefficient spectrum use.

Carriers also face unique difficulties serving land areas along the coastline. An unusually shaped shoreline or barrier island with numerous buildings and other "clutter," such as Galveston Island in the Houston MTA, for example, may require that sites be located directly on the coastline.⁴⁴ Similarly, in many places in the State of Florida's MTAs, the majority of PCS traffic is along the shoreline. Thus, transmission well into the offshore area in and beyond the MTAs is unavoidable — and importantly is needed to provide reliable quality service for PrimeCo's customers. Requiring frequency coordination with a water-based PCS licensee will

⁴³ The proposed "non-uniform" boundary for cellular would be particularly costly from an interference standpoint for PCS operations. An incumbent licensee would encounter severe interference problems from not only the neighboring Coastal Zone licensees, but with the Gulf Exclusive Zone licensees, particularly where a Coastal Zone would be very thin due to oil platforms closer to shore such as along the Texas coast. *See Second Further Notice* ¶ 33; *see also* n.42 *supra*.

⁴⁴ Galveston Island is two miles wide at its widest point, and is 30 miles long (including Bolivar Peninsula).

therefore compromise PrimeCo's service to land-based customers and to its water-based customers within the Gulfward MTA boundaries.⁴⁵

Co-block interference is also a significant concern here, where previously there were no prospective adjacent PCS licensees in the Gulf. For CDMA, there are only 11 channels (1.23 MHz per channel) available for use by A, B and C Block licensees, and three channels for the D, E and F Block licensees. When using one channel on the land, a different channel will have to be used by the water-based carriers which, in turn, would preclude the use of that channel on land to avoid interference. Competing incumbent and water-based Gulf PCS licensees will thus pose yet additional technical service challenges and limitations which will negatively impact PCS customers.

B. Separate Gulf Licensing Will Be Detrimental to Consumers

Because of the technical flexibility of the PCS rules, there is no requirement that compatible technologies (*i.e.*, CDMA, GSM, TDMA) be deployed between separate incumbent and Gulf PCS licensees. Therefore, if separate water-based PCS licenses are allocated, incompatible technologies could be deployed, to the detriment of the many land-based PCS customers who want to use their PCS phones for boating/offshore purposes. The potential for customer confusion and service disruption is very real. Moreover, subscriber costs (and roaming fees) would likely be much greater with competing providers/systems. Again, the public interest will suffer if additional water-based PCS licenses are allocated.

⁴⁵ As discussed *supra*, when PrimeCo purchased its PCS licensees it did so with the knowledge that *no* separate Gulf-based PCS licensees were allocated.

C. Site Availability Limitations Will Result in Disputes and Interference Problems Between Incumbent and Water-Based PCS Licensees

In light of the serious interference problems imposed by *offshore* transmitters, Gulf-based licensees' possible placement of transmitters *on land* — and the attendant interference and siting conflicts — also concern PrimeCo. To date, the Commission has prohibited offshore cellular licensees from placing transmitters on land without the land-based carrier's consent.⁴⁶ The Commission has now proposed allowing water-based cellular licensees to place transmitters on land, subject only to the Commission's SAB extension rules. Because of PCS technology, however, separate Gulf PCS licensees might also seek authority to base land sites, creating additional interference, frequency coordination, coverage boundary line disputes and facilities siting problems for incumbent PCS licensees. The significant problems that Gulf licensees' land-based transmitters pose for cellular licensees are even more acute for PCS, where more antenna sites are needed for service provision. Again, any new Gulf PCS licensees will pose interference problems for current authorized MTA operations.

The design and performance of a PCS system is based on the premise of the "best or strongest server." Thus, if a separate water-based licensee's facilities are placed in service in the same PCS frequency band on an adjoining land site, it is likely that whatever site is serving the area the strongest — be it the incumbent or a separate water-based licensee's site — would take the traffic. *It is not possible for a separate co-block water-based licensee to reliably serve the water areas from land-based sites without interfering with incumbent PCS licensees' operations, even if highly directional antennas are used.* This problem would result in both

⁴⁶ 1 FCC Rcd. 511 (1986), *aff'd in relevant part*, 2 FCC Rcd. 3695, 3696 (1987).

interference and coordination disputes between incumbent and water-based PCS licensees and will compromise the provision of reliable service to the public.

The site availability requirements of PCS technology would also subject both incumbent and water-based licensees to facilities siting disputes with each other and with state and local governments which could in turn impact land- and Gulf-based service in coastal areas.⁴⁷ Local governments impose a panoply of siting and construction restrictions and requirements on PCS and other CMRS providers and system deployment for incumbent PCS licensees has been negatively impacted in many areas because of siting restrictions and prohibitions. By way of example, zoning laws in jurisdictions along the Florida Gulf coast have made facilities siting very difficult for incumbent PCS licensees. In fact, in the Florida MTA areas, sites are not permitted in offshore areas and land siting is significantly restricted.⁴⁸ Incumbent PCS licensees already must compete with each other and with cellular and other CMRS providers for sites, and if incumbent PCS licensees are required to now contend with separate water-based Gulf licensees for land-based sites, service to land-based customers will suffer.

⁴⁷ Again, PrimeCo and other incumbent PCS licensees bid for their respective MTA and BTA markets, and designed and built their systems, with the certain knowledge that there would be no separate Gulf-based licensees seeking to locate on land sites. There is no basis for now authorizing new land siting for any newly-allocated separate Gulf licensees.

⁴⁸ Most of PrimeCo's sites in the Florida MTA market are on rooftops and are limited to the height of the tallest buildings, and towers are generally forbidden by zoning authorities. In several instances, PrimeCo has been required to keep antennae below the top of the roof parapet. Thus, in these areas PrimeCo must rely on a large number of carefully placed sites rather than high antenna height placement or towers to ensure adequate service for its MTA customers.

For these and other reasons, separate Gulf license areas would pose significant problems and result in service degradation, to the detriment of land and water-based PCS customers.⁴⁹

III. ESTABLISHING A SEPARATE GULF OF MEXICO SERVICE AREA FOR BROADBAND PCS WOULD UNDERMINE SECTION 309(j) STATUTORY OBJECTIVES

Any decision to establish additional broadband PCS licenses to serve a separate Gulf service area would presumably be subject to competitive bidding procedures.⁵⁰ The Commission must consider, however, whether auctioning separate PCS Gulf licenses would be consistent with Section 309(j) of the Communications Act.⁵¹ PrimeCo submits that separate Gulf PCS allocations would not. As demonstrated herein, the characteristics of PCS service portend to an unsuccessful auction of Gulf PCS licenses and would not promote public interest purposes. Instead, Section 309(j) objectives would be better served by expressly recognizing the right of incumbent PCS licensees to serve Gulf areas.

A. Establishing a Separate Gulf Service Area Will Hinder PCS Deployment in the Gulf

Section 309(j)(3) of the Communications Act requires that the Commission seek to “promote the development and rapid deployment of new technologies, products, and services

⁴⁹ As noted above, attached are declarations from William David Walker (PrimeCo) and Andrew Clegg (Comsearch) supporting the engineering/technical statements contained herein. *See* Walker and Clegg Declarations (Attachments A and B hereto).

⁵⁰ *See Second Further Notice* ¶ 2 (stating that the Commission’s goals in this proceeding include the awarding of licenses “to those carriers that value the spectrum most highly”).

⁵¹ *See* 47 U.S.C. §§ 309(j)(3), (4); *see also id.* § 309(j)(2)(B) (licenses may be awarded through competitive bidding if competitive bidding will promote the objectives of Section 309(j)(3)).

for the benefit of the public . . . without administrative or judicial delays.”⁵² Any auction of licenses to serve separate Gulf service area(s) would likely not commence until some time in late 1997 or early 1998 — several years after the initial A and B Block licenses were granted and after all of the broadband PCS auctions have concluded.⁵³ In turn, actual build-out of stand-alone PCS networks into the Gulf would take even longer; the new licensees would have to compete for comparatively few sites on which to place their facilities, and all would have to contend with unusually high construction and maintenance costs.

Incumbent PCS licensees, in contrast, *already* are able (and are particularly well situated) to deploy broadband PCS to the Gulf. Indeed, PrimeCo and other incumbent PCS licensees have *already* undertaken efforts to deploy PCS services capable of serving the Gulf. PrimeCo has paid for its licenses and expended significant monies in system development activities. The company is authorized to provide service for land and offshore customers, and there is no reason to now create the interference, coordination, siting and other service problems which will result from additional PCS license allocations. Thus, to promote rapid deployment, the Commission should act to confirm the authority given incumbent PCS licensees to provide Gulf service.

B. Licensing a Separate Gulf Area Will Not Result in a Broad Dissemination of Licenses Among a Wide Variety of Applicants and Will Result in Inefficient Spectrum Use

Section 309(j)(3) also requires that the Commission promote “economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to

⁵² 47 U.S.C. § 309(j)(3)(A).

⁵³ See *Applications for A and B Block Broadband PCS Licenses*, 11 FCC Rcd. 3229, 3226 (Wireless Telecom. Bur. 1995) (granting A and B Block licenses effective June 23, 1995).